



Comptroller General  
of the United States  
Washington, D.C. 20548

144407 Rodriguez

## Decision

Matter of: Acker Electric Company

File: B-244413

Date: July 12, 1991

Aaron Acker for the protester.  
Vera Meza, Esq., and Cynthia Garrison, Esq., Department of the Army, for the agency.  
Edwin Rodriguez, and Robert C. Arsenoff, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DISCUSSION**

1. Allegation that solicitation was improperly set aside for small and disadvantaged businesses is dismissed as untimely since it was raised more than 10 days following bid opening--an event which constituted notice of adverse action with regard to an earlier protest filed with the agency.

2. Allegation that awardee will not perform in accord with subcontracting restrictions set forth in the solicitation is dismissed because protester is not eligible for award under the set-aside solicitation and is, thus, not an interested party to protest.

### **DECISION**

Acker Electric Company protests the Department of the Army's decision to set aside invitation for bids (IFB) No. DAAC01-91-B-0029 for small and disadvantaged businesses (SDB). Acker also challenges the awardee's ability to perform its contract to replace lighting fixtures in accord with the terms of the IFB.

We dismiss the protest.

In April 1991, Acker protested the SDB set-aside to the Army and requested that the solicitation be opened to all small businesses. Notwithstanding the agency-level protest, bid opening was held on May 8. The Army formally denied Acker's protest on May 28 and this protest was filed on June 11.

Where, as here, a protest has been filed with a contracting agency, a subsequent protest to this Office must be filed within 10 days of actual or constructive notice of initial

agency action which is adverse to the protester's interests-- such as the occurrence of bid opening in the face of a challenge to the terms of an IFB. See Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. §§ 21.1(a)(3), 21.0(f)); Scopus Optical Indus., B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221 (subsequent formal denial of agency-level protest is not germane to measuring timeliness). Since Acker waited until June 11 to file its protest allegation here regarding the set-aside decision--over 1 month after the May 8 bid opening--we dismiss it as untimely.<sup>1/</sup>

Acker also alleges that the awardee will not perform in accord with the IFB restriction on subcontracting. However, the protester lacks a direct economic interest in the award since it is not eligible itself for award under the terms of the set-aside. The protester would not be in line for award if its protest were sustained and, thus, is not an "interested party" for the purposes of challenging the selection decision. See 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.0(a)); Ideal Servs., Inc.; JL Assocs., Inc., B-238927.2 et al., Oct. 26, 1990, 90-2 CPD ¶ 335.

The protest is dismissed.

*for John Van Schick*  
John Brosnan  
Assistant General Counsel

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<sup>1/</sup> This aspect of the protest is untimely despite Acker's suggestion that the Army indicated that a protest could not be filed with this Office until a formal agency decision had been issued since the protester is charged with constructive notice of our Bid Protest Regulations which are published in the Federal Register and appear in the Code of Federal Regulations. Whelen Eng'g Co., B-239189, Aug. 1, 1990, 90-2 CPD ¶ 89.